UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. LOUIS CARDINALS, LLC

and Case 14-CA-213219

JOE BELL, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Counsel for the General Counsel (General Counsel), pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, files the following answering brief opposing St. Louis Cardinals, LLC's (Respondent) exceptions.

I. Statement of the Case

This case was heard before Administrative Law Arthur J. Amchan (ALJ) on August 21-22, 2018. The ALJ issued a Decision and Order on October 17, 2018, finding that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The ALJ concluded that Respondent retaliated against James Maxwell[1] by discharging or failing to recall him to work, failing to recall Eugene Kramer and Joe Bell, and not recalling Thomas Maxwell in a timely manner (jointly, the discriminatees). The ALJ further found that Director of Facility Operations Hosei Maruyama violated Section 8(a)(1) by telling Thomas Maxwell that actions have consequences and implying that Maxwell and others were receiving adverse employment actions due to protected union activity. On November 14, 2018, Respondent filed exceptions to the ALJ's Decision and Order.

[1] General Counsel concurs with Respondent that the ALJ Decision incorrectly refers to discriminatee James Maxwell as "Joseph" and "Joe" Maxwell.

II. Facts

The ALJ's findings of fact are supported by evidence in the record and are free from error. Accordingly, General Counsel will not restate the facts here.

III. Analysis

A. Contrary to Respondent's exceptions, the ALJ properly ruled that the discriminatees' actions did not lose the protection of the Act.

Respondent contends that the discriminatees' internal union activities were not protected because they had a purportedly unlawful objective. The ALJ's findings on this matter are correct and free of error.

Respondent resorts to obfuscation in its attempt to characterize the discriminatees' actions as unprotected. At its core, Respondent's essential argument is that the discriminatees' actions were not protected pursuant to Section 8(b)(1)(B) of the Act because they were trying to force Respondent to replace its chosen representative for the adjustment of grievances when they brought an internal union charge against newly-designated foreman Patrick Barrett. Yet throughout its brief, Respondent never uses the statutorily meaningful phrase "grievance adjustor" to describe Barrett. Instead, Respondent misdirects the reader's attention by describing the discriminatees intentions as removing Barrett *as foreman*.

Respondent's real argument is not that the discriminatees lost protection by trying to remove Barrett as foreman; as the ALJ noted in footnote 6, trying to remove a supervisor is protected activity when, as here, that supervisor can affect conditions of employment.[2] *See Senior Citizens Coordinating Council*, 330 NLRB 1100, 1103 (2003).

[2] Contrary to Respondent's claim that there is no evidence in the record supporting a purpose behind the charges related to a term and condition of employment, several of the discriminatees testified that they filed the charges to prevent Barrett from subsequently terminating them. (Tr. 63, 138, 186).

Respondent cannot support its real argument, a fact that is immediately apparent if the words "designated grievance adjustor" are read in place of "foreman" throughout Respondent's brief. There is no evidence that Barrett was a designated grievance adjustor at the time that the internal union charge was filed against him, since he would not even take on the responsibilities of the foreman position for almost a month. Nor was he a designated grievance representative when the trial board convened at the end of Barrett's first full day as foreman on January 2, 2018. If Barrett was not a grievance processor at the time of the internal union charge and trial board, there was no adverse significance under the Act to an attempt to remove him as foreman.

Respondent contends that the foreman was in fact a grievance processor. Any actual evidence Respondent presented of Barrett's involvement in the grievance process is irrelevant because such involvement occurred after all of the material events in this case: the internal union charge, trial board, retaliation, and filing of the underlying unfair labor practice charge. Respondent cannot manufacture evidence of grievance adjusting after the fact to try to impugn the discriminatees' motives from three months earlier. Further, there is nothing inherent in the foreman position that makes it a grievance adjustor. Respondent is signatory to a collective-bargaining agreement that states that step one grievances can be settled by either "the Employer's Representative *or* Foreman." (GC Exh. 2 (emphasis added)). Respondent's foreman is only a potential grievance adjustor and Respondent was under no obligation to select him for that role. There was no history of Respondent's prior foreman handling grievances. Grievance adjustment was not discussed during James Maxwell or Thomas Maxwell's job interview for the foreman position. (Tr. 44, 194). When Respondent created a description of the responsibilities of the foreman position, grievance adjustment was not included in that multi-page document. (Tr. 271; GC Exh 14). Respondent did not tell anyone prior to the January 3, 2018 trial board that Barrett,

as opposed to any other individuals, would resolve grievances. Barrett was not a grievance adjustor during all of the material times.

Further, there was no testimony during the hearing that any of the discriminatees' objectives in filing the internal charge was to remove Barrett's ability to resolve grievances. Accordingly, there is no basis for Respondent's assertion that the discriminatees sought to specifically remove Barrett as the grievance adjustor. This is why Respondent subtly uses the word "foreman" instead of the legally meaningful "grievance adjustor." Unfortunately for Respondent's argument, there is nothing generally unlawful about seeking to have a foreman removed.

As there was no evidence whatsoever at the hearing that any of the discriminatees filed the internal union charge as a way to impact Barrett's ability to adjust grievances, Respondent's fallback argument is that the ability to resolve grievance is somehow inherent in the foreman position. As noted above, there is no evidence supporting this supposition. Further, this argument is just a restatement of the rejected reservoir doctrine. Prior to May 1987, the Board had taken the position that Section 8(b)(1)(B) protected any 2(11) supervisor against internal union discipline, because in the future such a supervisor could become engaged in collective bargaining or grievance adjustment. This theory was referred to as the "reservoir doctrine," as it created a pool or reservoir of potential authority to cover any 2(11) supervisor. The Supreme Court rejected this doctrine in *NLRB v. Electrical Workers Local 340 (Royal Typewriter)*, 481 U.S. 573, 586 (1986), when it held that Section 8(b)(1)(B) only prohibits union discipline of supervisors who actually perform 8(b)(1)(B) duties. Here, Barrett started as foreman on January 2, 2018, nearly a month after the discriminatees filed the internal charge on December 4, 2017. The actual trial board hearing was held at the end of Barrett's first day as foreman and he did not

adjust any grievances on that day. Respondent did not designate Barrett as the grievance adjustor prior to him taking the job as foreman. Thus, any ability Barrett had to actually adjust grievances was hypothetical at the time that the internal charge was filed and when the trial board occurred. Absent evidence that Barrett actually performed any Section 8(b)(1)(B) duties, he was not in any way protected from internal union chargers pursuant to the reservoir doctrine.

In sum, Respondent attempted a subtle misdirection when it substituted the statutorily meaningless phrase "remove as foreman" for the statutorily significant phrase "remove as grievance adjustor." Respondent understandably tries to make this substitution because there is no evidence that the discriminatees had any motive that would lose the protection of the Act. Respondent's attempt, however, should be rejected. The discriminatees were engaged in protected activity when they filed the internal union charge and they did nothing to lose the protection of the Act.

B. Contrary to Respondent's exceptions, the ALJ properly ruled there is no Section 8(b) defense available to Respondent.

There are two express and necessary statutory elements to a Section 8(b)(1)(B) allegation: (a) action by a union or its agents and (b) coercion. Neither exists here. Accordingly, the ALJ properly found that Respondent's Section 8(b)(1)(B) defense was not applicable.

First, by its express terms, Section 8(b) of the Act applies to labor organizations and their agents. It simply does not apply to the actions of individual rank and file members. *See Tenn-Tom Constructors*, 279 NLRB 465, 466 (1986) ("Congress has expressed its intent that generally labor organizations and their agents, but not individual employees, should be responsible for the unfair labor practices of labor organizations" in an 8(b)(1)(B) context). There is good reason for this; unions have a power to coerce through the bargaining process that rank and file members do

not have. There is a distinction between conduct which is merely annoying and conduct which is actually coercive.

Respondent argues that the Board expanded the scope of Section 8(b)(1)(B) in *Bovee and Crail Construction Co.*, 224 NLRB 509 (1976). The issue in *Bovee and Crail* was whether clear agents of the union could be terminated for bringing unlawful internal union charges against a supervisor. The Board found that Section 8(b)(1)(B) did apply, as the employees were the union's agents and were "acting on behalf of the Union." *Id*. at 511. This narrow holding did not expand Section 8(b)(1)(B)'s statutorily limited scope to apply to rank and file employees.

The second problem with the asserted 8(b)(1)(B) defense is that Respondent was never actually coerced by anything other than its own lack of knowledge about labor law.[3] Only an employer can be coerced in the selection of a bargaining representative. The only tangible evidence of "coercion" presented at the hearing is that Barrett himself offered to quit his job as foreman. (Tr. 302). This was pressure that Barrett put on himself, and not pressure against Respondent; if Barrett had his own qualms about taking the foreman position given his history of side work, that is not coercion directed at an employer. The Board has found that Section 8(b)(1)(B) coercion comes in two forms: direct and indirect. Direct coercion of an employer occurs when bargaining is conditioned on removing a representative. Indirect coercion occurs when a bargaining representative is pressured by his or her union to adopt the union's positions

[3] Respondent applies a double standard of statutory awareness when it claims that it does not matter that the Union was not legally permitted to obtain Barrett's discharge for failing to pay a fine. Respondent claims that the discriminatees' incorrect belief that Barrett could be removed for not paying a fine should be credited even if it is not supported by Act. Respondent essentially argues that it was "coerced" because it did not read Section 8(b)(2) the Act to find out that the Union could not effectuate Barrett's removal for failing to pay a fine. Yet Respondent then essentially argues that the discriminatees should be held to account for the spirit of Section 8(b)(1)(B), which prohibits a union from seeking to remove a grievance adjustor. Respondent argues the discriminatees' had an unlawful purpose underlying the internal charge. Thus, on one hand Respondent seeks to be shielded from knowledge of the plain language of the Act while it seeks to force the other side act in accordance with what it sees as the spirit or underlying intention of the Act even when that is contradicted by the Act's plain language.

over that employer's interests. *See Elevator Constructors (Otis Elevator Co.)*, 349 NLRB 583, 585 (2007).

Intraunion fines, by their very nature, do not impact the employer or the employer-employee relationship unless the fines are directed at 8(b)(1)(B) duties like grievance processing. *Id*. When a fine is directed at other non-bargaining conduct, such as performing nonunion work, the fines will only serve to deter the member from performing nonunion work and will not cause the member to prioritize the union's interests over the employer's interests. *Id.* Refraining from doing nonunion work is a lawful objective which does not impact, much less coerce, Respondent.

Respondent argues that the timing of the internal charge immediately after it named Barrett as the foreman in waiting makes that charge coercive. This is nonsensical. There is no risk of dual loyalties of a bargaining representative. Absent evidence of some pressure *on an employer*, there is no Section 8(b) coercion. Moreover, any pressure directed at Barrett involved his side work and was not related to any Section 8(b)(1)(B) activities. Through any analysis, Respondent was not coerced.

As noted above, there are two necessary elements for a Section 8(b)(1)(B) to apply: action by a union or its agents and coercion of an employer. Neither element exists here.

C. Contrary to Respondent's exceptions, the discriminatees' motivation for filing the internal charge is immaterial.

Respondent argues that the discriminatees' actions were unprotected because of the personal subjective reasons or "true motives" they had for filing the internal union charge. Respondent contends that because the discriminatees had engaged in side work in the past, they were not really engaged in union activity when they filed the internal union charge since they could not genuinely be concerned with enforcing the prohibition on side work.

This argument rests on a fundamental misunderstanding of protected activities: an employer does not get to judge the sincerity of an employee's protected union activity. As the Board wrote in *Fresh & Easy Neighborhood Market*,

> [a]n employee's subjective motive for taking action is not relevant to whether that action was concerted. "Employees may act in a concerted fashion for a variety of reasons-- some altruistic, some selfish--but the standard under the Act is an objective one." *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). Nor is motive relevant to whether activity is for "mutual aid or protection." Rather, the analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees.

361 NLRB No. 12, 4 (2014). The Board went on to note that, "[t]he motives of the participants are irrelevant in terms of determining the scope of Section 7 protections." *Id.*, citing *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 fn. 10 (7th Cir. 1976).

In light of this clear holding, there is no cause to analyze the discriminatees' subjective motives for filing the internal union charge. As the ALJ correctly found, the charge was protected activity on its face: it supported the Union by enforcing a prohibition on side work. It is immaterial if the discriminatees had private reasons for engaging in protected activities and their personal histories cannot be used to discredit whether their actions were protected and concerted.

D. Contrary to Respondent's exceptions, the ALJ properly applied *Wright Line*.

Respondent contends that the ALJ misapplied *Wright Line* by not using the burden shifting analysis. This is simply incorrect, as the ALJ applied the *Wright Line* burden shifting framework. The ALJ found that the General Counsel met the first prong of the *Wright Line* analysis when he wrote that it was "clear that Respondent, by Barrett, discriminated against the 4 [discriminatees] because they file the union charges." The ALJ then found that Respondent did not carry its burden of showing that it would have taken the same steps absent protected activity when he wrote, "Respondent's alternative explanations for not recalling the 4 are pretextual."

This is a complete *Wright Line* analysis. By finding that the given reasons for not recalling the discriminatees were pretextual, the ALJ concluded that Respondent would not have taken the same actions absent the protected activity.

Respondent may quibble with the fact that the ALJ did not accept its purported reasons for not returning the discriminatees, but that is factual determinations to be made by the judge. In fact, the ALJ addressed Respondent's arguments about poor work quality and misconduct when he wrote that, "[t]here is no evidence that the Cardinals were unhappy with the quality of work performed for it by any of the discriminatees." Further, Respondent's own manager, Hosei Maruyama, told one of the discriminatees that "actions have consequences," a clear allusion to link between the internal charge and subsequent adverse employment actions. Just one month before the discriminatees filed the internal union charge, Respondent gave three of them pieces of paper entitled "Intent to Return Letter," stating that "[t]he St. Louis Cardinals intends to continue your employment for 2018 as a Painter." (GC Exh 10-12). All of this reasonably led to the conclusion that Respondent's claim that it would not have continued the discriminatees' employment for 2018 as painters was simply not true. Thus, there was an ample factual basis for the ALJ to conclude that the Respondent's purported reasons for not returning the discriminatees were pretextual and the *Wright Line* analysis was properly applied.

IV. Conclusion

Respondent's remaining arguments are likewise without merit. To the extent that General Counsel does not address those arguments in this brief, this should be understood to reflect General Counsel's belief that the Board will apply well-established precedents and affirm the ALJ's decision. The failure to address such arguments is not a concession that Respondent's arguments are meritorious. Accordingly, Counsel for the General Counsel respectfully requests

the Board to affirm the administrative law judge's findings, conclusions, and recommended Order.

November 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, Section 102.114, a true and correct copy of the foregoing Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was e-filed with the National Labor Relations Board and served via electronic mail on this 27th day of November 2018, on the following parties:

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